PUBLIC BANK BHD

v.

LIM CHAN KWANG

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[SUIT NO: 22-26-2001-II]
18 JANUARY 2005

CIVIL PROCEDURE: *Judgments and orders - Appeal against - Issues - Service - Whether there was proper service of plaintiff's summons in chambers on defendant - Whether judgment sum was correctly obtained - Whether plaintiff failed to inform defendant of particulars as to computation of sum plus interest - Failure to query monthly statements submitted - Whether defendant can refute liability to pay sum claimed - Notification of variation of interest rate made vide statements of accounts - Whether sufficed - Whether plaintiff has breached banker customer relationship by recalling overdraft facility - Whether defendant had raised triable issues or shown any defence on merits*

This was an appeal by the plaintiff/appellant ('the plaintiff') *vide* O. 56 r. 1 of the Rules of the High Court 1980 ('the RHC') against the decision of the deputy registrar allowing the summons in chambers (encl. 61) filed by the respondent/defendant ('the defendant') and setting aside the order of the court (encl. 52) and the judgment entered against the defendant (encl. 49). The issues that arose were (1) whether there had been proper service of the plaintiff's summons in chambers on the defendant; (2) whether the plaintiff had failed to inform the defendant of the particulars as to how computation of the sum RM582,271.65 plus interest and RM745,098.79 were arrived at, and of the change of the Base Lending Rate ('BLR') and interest rate and (3) whether plaintiff had breached the banker-customer relationship by recalling the overdraft facility without reasonable cause.

Held (allowing the appeal):

[1] Exhibit LSN2 is an affidavit of non-service affirmed by the plaintiff's server, one Lo Chin Fah, on 8 February 2002 which stated categorically where and when he had tried to serve the plaintiff's summons in chambers on the defendant. In his affidavit, he affirmed that he had attempted service on the defendant on two occasions *ie*, 24 January 2002 and 29 January 2002 respectively. Both attempts had failed and due to that, the plaintiff had applied for an order for substituted service by

advertisement to serve the said summons in chambers on the defendant. Proof of service by causing the same to be advertised in one issue of the 'See Hua Daily News' is exhibited as annexure A in exh. LSN4. The defendant's contention was thus baseless and devoid of any merit. (pp 437 f-h & 438 a)

[2] Clause 9 of the plaintiff's letter of offer (exh. LSN9) stipulated that 'interest on overdraft is calculated on daily balances with monthly rest that is capitalized or compounded monthly.' In this case the rate of interest chargeable was 2.5% above the Base Lending Rate ('BLR'). There was no reason for the defendant to dispute this since he had signed acknowledging acceptance of the terms and conditions of the letter of offer, including the manner interest is calculated. Furthermore, throughout the period of 31 October 1994 to 30 June 2000, the plaintiff had sent to the defendant monthly statements which contained particulars as to the status of the defendant's current account balance, which showed that the amount outstanding as at 30 June 2000 was RM582,271.65 plus interest. Whereas the particulars for the computation of RM745,098.79 plus interest was evinced by the plaintiff's bankruptcy notice dated 30 June 2003. The defendant had not queried the monthly statements and he could not now refute his liability to pay for the sum claimed by the plaintiff. (pp 438 e-h & 439 a)

[2a] The notification of variation of interest rate made *vide* the statements of accounts would suffice as it was in tandem with the requirement of cl. 3 of the letter of offer which stipulated that notice of variation may be given "in the form of unsigned printed or computer generated format" and such notice "shall be deemed to have been sufficiently served as it is left or sent by post to the last address registered with (the bank)". As such monthly statements were sent to the defendant's last registered address, the defendant was precluded from denying receipt of such notification. (p 439 b-d)

[3] Between end of July 1996 to July 2000, the plaintiff's bank had sent numerous reminders to the defendant for repayment of the excess overdrawn from the defendant. Consequently, the plaintiff was compelled to recall the overdraft facility which they were justified in doing so as the terms of the repayment was 'on demand.' The letter of demand was sent by registered post to the defendant's last registered address and was deemed to have been served. There was no basis in the defendant's contention of plaintiff breaching any banker-customer relationship. The

plaintiff had satisfactorily shown that to date, the defendant had failed to satisfy the sums due and owing. The defendant was the party at fault. Further, the defendant had not raised any triable issues or showed any defence on merits. (pp 440 h, 441 f & 442 d-e)

[Decision of deputy registrar set aside; plaintiff's appeal allowed with costs.]

Case(s) referred to:

Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd [2003] 3 CLJ 791 CA ***(refd)***

Muniandy Thamba Kaundan v. D & C Bank Bhd [1996] 2 CLJ 586 FC ***(refd)***

Perwira Habib Bank Malaysia Bhd v. Lim Hong Tatt [1989] 1 CLJ 54; [1989] 2 CLJ (Rep) 246 HC ***(refd)***

Legislation referred to:

Interpretation Acts 1948 and 1967, s. 12
Rules of the High Court 1980, O. 56 r. 1

For the plaintiff/appellant - Jammie Tai; M/s Tang & Partners
For the defendant/respondent - Ernest Chua; M/s Ernest Chua & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:

This is an appeal by the plaintiff/appellant ("the plaintiff") *vide* O. 56 r. 1 of the Rules of the High Court 1980 ("the RHC") against the whole decision of the deputy registrar given on 22 July 2004 wherein the deputy registrar allowed the defendant's summons in chambers dated 10 September 2003 (encl. 61) and set aside the order of court dated 10 July 2002 (encl. 52) and the judgment entered against the defendant dated 29 July 2002 (encl. 49).

The application (encl. 95) of the respondent/defendant ("the defendant") dated 10 September 2003 is, *inter alia*, for the following orders:

(i) leave be granted to the defendant for enlargement of time to file and serve this application for setting aside the order of the court dated 10 July 2002 and the judgment of the court dated 29 July 2002.

(ii) leave be granted to the defendant for enlargement of time to serve an affidavit in opposition to the affidavit of Law Sie Ning (f) affirmed on 11 December 2001.

(iii) that the *ex parte* order dated 10 July 2002 and the *ex parte* judgment dated 29 July 2002 entered against the defendant be set aside (hereinafter referred to as "the said application").

The said application is supported by the affidavit in opposition affirmed by Lim Chan Kwang on 9 September 2003 ("Lim's 1st affidavit") (encl. 61) and affidavit in opposition II and Affidavit In Opposition III affirmed by the same on 30 December 2003 and 16 March 2004 respectively ("Lim's 2nd and 3rd affidavit") (encls. 67 and 75). The plaintiff opposed the said application *vide* the affidavit in reply and affidavit in reply no. 2 of Law Sie Ning (f) affirmed on 13 November 2003 and 31 January 2004 respectively ("Law's 1st and 2nd affidavit") (encls. 64 and 71).

The court has considered the submissions of both the learned counsel for the plaintiff and the defendant, Mr. Ernest Chua and Miss Jammie Tai respectively, including the relevant cause papers and authorities cited in support. The court's findings and evaluation include the following. Essentially there are 3 issues to be determined by the court.

Firstly, whether there has been proper service of the plaintiff's summons in chambers dated 11 December 2001 and the supporting affidavit of Law Sie Ning (f) affirmed on 11 December 2001 on the defendant (encl. 31).

The defendant contends that the plaintiff has not been able to prove service of the said summons in chambers dated 11 December 2001 by its process server, Lo Chin Fah as there is no proof of any affidavit by the said process server "to state categorically where and when did he try to serve the said summons in chambers on the defendant".

I am in agreement with the plaintiff who submitted that such a contention is baseless and devoid of any merit. The defendant's claim is negated by the existence of exh. LSN2, exh. LSN3 and exh. LSN4. Exhibit LSN2 is an affidavit of non service affirmed by the plaintiff's process server, Lo Chin Fah, on 8 February 2002 which stated categorically where and when did he try to serve the said summons in chambers on the defendant. In his affidavit he affirmed that he has attempted service of the summons in chambers dated 11 December 2001 on the defendant on two occasions ie, 24 January 2002 and 29 January 2002 respectively. During his first attempt, he was informed by an occupant of 199, Lorong Hui Sing Garden No. 4, Kuching, Sarawak that the defendant was out. He then pre-arranged to meet the defendant at 199, Lorong Hui Sing Garden No. 4, Kuching, Sarawak on Wednesday, 29 January 2002 at 3pm *via* a letter of appointment dated 24 January 2002. However, on the appointed date, time and place the defendant did not appear to accept service of the same.

Due to the unsuccessful attempts, the plaintiff applied for an order for substituted service by advertisement to serve the said summons in chambers dated 11 December 2001 on the defendant as is evident by exh. LSN3, the order of court dated 11 February 2002 granting the same. Proof of service by causing the same to be advertised in one (1) issue of the "See Hua Daily News" on 9 May 2002 (Thursday) is exhibited as Annexure 'A' in exh. LSN4, the affidavit of service affirmed by Kehong Ak Sack on 13 May 2002.

Having found that the judgment entered against the defendant dated 29 July 2002 is a regular judgment, the court would have to consider whether there are any merits in the defendant's defence. The 2nd issue to be determined which relates to the defendant's ground in arguing that the defendant has a *bona fide* defence and counterclaim, is whether the judgment sum of RM582,271.65 plus interest was correctly obtained and similarly, as to the veracity in the calculation of the sum of RM745,098.79 plus interest as at 30 June 2003. The defendant alleged that the plaintiff has failed to inform him of the particulars as to how the computation of the sum of RM582,271.65 plus interest as at 30 June 2000 and RM745,098.79 plus interest as at 30 June 2003 were arrived at and of the change of the BLR and interest rate. It is the defendant's contention that the onus is on the plaintiff to do so. In support, Mr. Chua cited *Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd* [2003] 3 CLJ 791.

In addressing the 2nd issue, I am inclined to agree with the submission of learned counsel for the plaintiff. Clause 9 of the plaintiff's letter of offer dated 26 September 1996 (exh. LSN9) stipulates that "Interest on overdraft is calculated on daily balances with monthly rest that is capitalised or compounded monthly". In this case the rate of interest chargeable was 2.5% above BLR. There is no reason for the defendant dispute this since he has signed acknowledging acceptance of the terms and conditions of the letter of offer, including the manner interest is calculated.

Furthermore, the plaintiff has throughout the period of 31 October 1994 to 30 June 2000 sent to the defendant monthly statements (exh. LSN10) at P.O. Box 2323, 93746 Kuching, one of defendant's last registered address as per his letter of offer which he did not deny receiving. These monthly statements contain particulars as to the status of his current account balance, CA 43-00456-5, (which he did not dispute), which show that the amount outstanding as at 30 June 2000 was RM582,271.65 plus interest. Whereas the particulars for the computation of RM745,098.79 plus interest is evinced by the plaintiff's bankruptcy notice dated 30 June 2003 (exh. LCKI) which the defendant did not deny receipt thereof on 18 August 2003 as averred and exhibited by him in para. 2 of Lim's 1st affidavit.

On every statement of account it is to be noted are inscribed the words, "The items and balances shown above will be considered correct unless the bank is notified of any discrepancy within 14 days". The defendant has not queried the monthly statements and he cannot now refute his liability to pay for the sum claimed by the plaintiff; as per Siti Norma Yaakob J (as she then was) in *Perwira Habib Bank Malaysia Bhd v. Lim Hong Tatt* [1989] 1 CLJ 54; [1989] 2 CLJ (Rep) 246 with whose views I agree.

Although the last notification of change of interest rate sent to the defendant was dated 14 August 1999 (exh. F) the variation of the BLR is now reflected in the statement of accounts, as and when there is a change. I am of the view that the notification of variation of interest rate made *vide* the statements of accounts would suffice as it is in tandem with the requirement of cl. 3 of the letter of offer (exh. LSN9) which stipulates that notice of variation may be given "in the form of unsigned printed or computer generated format" and such notice "shall be deemed to have been sufficiently served if it is left or sent by post to the last address registered with (the bank)". As such monthly statements were sent to the defendant's last registered address with the plaintiff's bank, I am of the view that the defendant is precluded from denying receipt of such notification.

In addition, I am in agreement with Ms. Tai that *Lum Choon Realty*'s case is distinguishable from the present case in that the defendant is informed of the interest rate charged and notified of any variation of interest rate *vide* the monthly statements, unlike the former case where the aggrieved party was left in the dark as to what was the actual interest charged since the bank failed to state the BLR applicable at the time when the charge instrument was executed. In the instant case, cl. 3 of the letter of offer specifically provides "Our current Base Lending Rate (BLR) is 9.20% p.a.

The 3rd issue for the court's determination revolves on whether the plaintiff has breached the banker-customer relationship by recalling the overdraft facility without reasonable cause and putting the defendant's business in jeopardy and causing the defendant to suffer loss and damage as claimed by the defendant.

Based on exh. LSN-5 (application for accommodation dated 15 February 1996), exh. LSN8 (application for accommodation dated 21 September 1996) and exhibit LSN9, letter of offer dated 26 September 1996, the defendant submitted the following:

(1) the sum of RM960,000 is an additional sum granted for the continuous use of the overdraft facility. It is not used as security for 30% marginal deposit over the overdraft facility as alleged by the plaintiff.

(2) If so, plaintiff does not need the defendant to charge the 5 parcels of land as shown in exh. LSN9 as further security for the continuous use of the overdraft facility.

(3) If it is only for three weeks temporary overdraft as alleged in exh. LSN5 by plaintiff then why did plaintiff wait for about four years ie, from 29 September 1996 until 24 July 2000 when plaintiff's lawyer issued letter of demand, exh. E1.

(4) By recalling the overdraft facility without reasonable cause, especially that the overdraft has been secured by 5 parcels of land as shown in LSN9, the plaintiff has breached the banker-customer relationship and has thus put the defendant into jeopardy.

On the other hand, the plaintiff refuted the aforesaid allegations and proffered the following explanation as to the sequence of events which led to the recalling of the overdraft facility. On 15 February 1996, the defendant has applied for a temporary overdraft facility of RM3.2 million (exh. LSN5) ("the said TOD"). On 17 February 1996, the plaintiff approved and granted the said TOD to the defendant but subject to a 30% marginal deposit (exh. LSN6). Between March and September 1996, the plaintiff granted the defendant a few extensions of time to settle the said TOD. Despite that, the defendant failed to repay the said TOD to the plaintiff. On 26 September 1996, a Rank 1 charge of RM960,000 was created over 5 parcels of land described as Lots 118, 131, 132, 133 and 134 all of Block 4, Gading Lundu Land District belonging to Magnigain Sdn. Bhd. The said RM960,000 was never setup for the defendant's utilization as alleged by the defendant. It is created as the security of 30% marginal deposit over the said TOD granted to the defendant on 17 February 1996 as is evident by exhs. LSN7 and LSN8. On 25 November 1996 or thereabout, the plaintiff had to force sell 190,000 unit of shares belonging to the defendant in KLSE to recover the said TOD. The net proceeds from the force sell of the defendant's shares amounting to RM3,101,977.92 was credited into the defendant's account, leaving an excess of RM518,458.65 as at 30 November 1996. Between end of 1996 to July 2000, the plaintiff's bank had sent numerous reminders to the defendant for repayment of the excess overdrawn from the defendant and the defendant did make a few promises to pay the plaintiff as per exhs. "LSN11", "LSN12", "LSN13", "LSN14", "LSN15" and "LSN16". Finally, the plaintiff was compelled to recall the

overdraft facility which they were justified in doing so as the terms of repayment is "on demand" as per exhs. LSN7, LSN8 and LSN9. The letter of demand dated 24 July 2000, exh. E1 was issued by Messrs. Tang & Partners Advocates to the defendant at his last address known to the plaintiff at No. 199, Lorong Hui Sing Garden No. 4, Kuching, Sarawak by way of registered mail. Exhibit E2 is the proof of posting as per item 15 in the registered mail register of Messrs Tang & Partners Advocates. Further, the postal stamp on the said register bears the date 27 July 2000.

The defendant denied receiving the said letter of demand relying on the case of *Muniandy a/l Thamba Kaundan v. D & C Bank Bhd* [1996] 2 CLJ 586 for the proposition that sending a letter is a far cry from receiving it. The plaintiff refuted the defendant's contention premised on s. 12 of the Interpretation Acts 1948 and 1967 ("the Interpretation Acts") arguing that the presumption will apply in that service of the said letter of demand has been effected in the ordinary course of the post.

In normal circumstances, a letter of offer would contain a specific provision on effecting service of documents. A perusal of the letter of offer, in this instant case, exh. LSN9, contains no such provision save for cls. 3 and 10 which relate to service of notice on variation of BLR and rate of interest and notice of any amendment of any terms and conditions. In the case of the latter, it has to be served by post or other means of delivery to the last registered address with the bank and such service therein "shall be effective and binding immediately upon serving".

Be that as it may, based on these two (2) contractual provisions, cls. 3 and 10, I conclude that it is reasonable to infer that the intended mode of service of the letter of demand, exh. LSN9, should be in the manner prescribed in the aforesaid two clauses. Thus the said letter of demand shall be deemed to have been served when it was sent by registered post to the defendant's last registered address.

Hence, with due respect to Mr. Ernest Chua, *Muniandy*'s case is not relevant and is distinguishable as there is a deeming clause in the letter of offer as I have explained above. With due respect also to Ms. Tai, s. 12 of the Interpretation Acts is not applicable since the opening words of s. 12 states:

Where a written law authorises or requires a document to be served by post, then until the contrary is proved, service:

(a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document; and

(b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post. (emphasis added)

The word "written law" is defined in s. 3 of the Interpretation Acts to include the Federal Constitution and Constitution of the States, Acts of Parliament, Ordinance and Enactments and other legislative enactments or legislative instruments of the United Kingdom and Northern Ireland. Therefore, in the context of the present case, there is no written law involved save for the said letter of offer, a contractual agreement, wherein I had alluded to earlier.

Having perused the affidavit evidence and the accompanying contemporaneous documents, I find that the plaintiff has satisfactorily shown that to date, the defendant has failed to satisfy the sums due and owing and there is no basis in the defendant's contention of plaintiff breaching any banker-customer relationship. I find that it is the defendant who is the party at fault and not the plaintiff as claimed by him.

In the circumstances, I am of the view that the defendant has not raised any triable issues or shown any defence on merits. Hence, notwithstanding that I agree with the learned deputy registrar's finding that the judgment entered against the defendant dated 29 July 2002 is a regular judgment, I set aside the said decision and allow the plaintiff's appeal with costs to be taxed unless otherwise agreed for the reasons adumbrated above.